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IN THE

Supreme Court of the United States

October Term, 1962
No. 1036

THEODORE ROOSEVELT NEALEY and INEZ DANKINS,
Petitioners,

vs.

THE STATE OF CALIFORNIA.

PETITION FOR WRIT OF CERTIORARI.

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THEODORE ROOSEVELT NEALEY and INEZ DANKINS,

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vs.

THE STATE OF CALIFORNIA.

PETITION FOR WRIT OF CERTIORARI.

To the Honorable the Chief Justice and the Associate Justices of the Supreme Court of the United States of America:

The Petition of Theodore Roosevelt Nealey and Inez Dankins for a Writ of Certiorari to the State of California and the Appellate Division of the Superior Court of the County of Los Angeles, State of California, respectfully seeks to review a judgment of the Appellate Division of the Superior Court of the State of California made and entered by said Court on the 18th day of January, 1963, a copy of which order by said court or opinion thereof is hereto appended and marked Exhibit "A", and the petitioners respectfully represent to this Honorable Court:

Opinions of the Courts Below.

The trial was by the court sitting without a jury. No opinion was rendered by the trial court. The opin-

ion of the Appellate Division of the Superior Court of the State of California, in and for the County of Los Angeles, has not been officially reported, but a copy thereof is attached hereto and marked Exhibit "A", and the court is respectfully referred thereto. A copy of the opinion is also a part of the record on file with the Clerk of this Court.

A Petition for Rehearing was filed with the Appellate Division of the Superior Court of the State of California, and said Petition for Rehearing was by that Court denied on the 29th day of January, 1963.

That your Petitioner filed a petition for a writ of Habeas Corpus or in the alternative a writ for Coram Nobis with the Supreme Court of the State of California, reciting substantially all of the questions presented herein and on April 3, 1963, said petition bearing Supreme Court No. CR 7355 was denied without opinion.

Statement of the Grounds on Which the Jurisdiction of This Court Is Invoked.

There is no provision by which the petitioners can themselves apply to the District Court of Appeal of the State of California, an intermediate appellate court in the State of California, nor to the Supreme Court of the State of California. The decision by the Appellate Division of the Superior Court of the State of California, in and for the County of Los Angeles, is final unless, by reason of a statute hereinafter referred to, the District Court of Appeal itself takes notice of the opinion and causes the case to be transferred to it, or unless the Appellate Division of the Superior Court itself adds a notation to the opinion as follows: "To be

published in Advance California Appellate Reports," and causes the opinion to be transferred to the District Court of Appeal for the District.[1]

This case is one which involves the denial of due process to the petitioners in that they were not properly apprised of the charges, and the administrative procedure provided in California was not followed prior to the filing of the complaint. Further, this appeal involves the validity of the amendment to the rules of the Judicial Council of the State of California providing for the method of reaching the District Court of Appeal, namely, Rule 6 of the amendments found at the Supreme and District Court of Appeal Rules, page 40 thereof, and heretofore set forth in the footnote 1.

The statutory provision believed to confer jurisdiction upon the court to review the justment of the court below is United States Code, Title 28, Section 1257(3). Hereinafter, the record herein referred to will be marked R, being the record transmitted by the Clerk of the Appellate Division of the Superior Court of

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[1]AMENDMENTS TO APPELLATE DEPARTMENT RULES ADOPTED BY THE JUDICIAL COUNCIL OF THE STATE OF CALIFORNIA, EFFECTIVE JANUARY 2, 1962 RULE 6. DECISIONS.

Each appeal shall be heard and determined or taken under submission at the session at which it was set for hearing, unless, for good cause to be entered in the minutes, it is continued for hearing to another date, or it is ordered to be submitted on briefs to be filed. The judges of the Appellate Department shall not be required to write opinions in any cases decided by them, but may do so whenever they deem it advisable or in the public interest. If an opinion is to be published in Advance California Appellate Reports, the clerk immediately upon the judgment in the case becoming final shall transmit one copy of the opinion to the publisher and another copy bearing the notation "To be published in Advance California Appellate Reports" to the District Court of Appeal for the district.

the State of California. The engrossed statement on appeal, which is the statement from the trial court as to the proceedings before it, will hereinafter be referred to as EGA, meaning engrossed statement on appeal.

Questions Presented for Review.

1. Were the appellants denied due process of law in that the section of the code providing for the giving of notice prior to the revocation of a license and hearing thereon were not complied with?

2. Was Nealey denied due process of law in that he was not afforded such a hearing, and he was not actually the licensee named at the involved establishments? There was no administrative hearing, notwithstanding the law provides therefor, and no notice of revocation of license.

3. It is our contention that the laws of the State of California are unconstitutional in that they deprive these petitioners from proceeding to the Supreme Court of the State of California, which is the highest court of the state, and the appellants' rights are limited to an appeal to the Appellate Division of the Superior Court, with the exception of the new amendment which provides that the District Court of Appeal if it deems the decision is in conflict with others or should be reviewed may transfer the case to it for hearing, or that the Appellate Division of the Superior Court may certify the case to the District Court of Appeal. No provision is made for an appellant to proceed either to the District Court of Appeal or to the Supreme Court of the State of California.

Statement of the Case.

Two separate complaints were filed against the defendants Theodore Roosevelt Nealey and Inez Dankins charging both defendants with violating Section 6071 of the Revenue and Taxation Code of California at two separate locations in the City of Pasadena. The cases were by stipulation of counsel consolidated for the purpose of trial. The trial was held in the Municipal Court of Pasadena Judicial District, County of Los Angeles, State of California, and after trial the defendants were found guilty. Thereafter, a notice of appeal was filed and the engrossed statement on appeal was settled by the court and thereafter the record transferred to the Appellate Division of the Superior Court of the State of California, in and for the County of Los Angeles. The defendant and petitioner Theodore Roosevelt Nealey at the commencement of the trial in which both complaints had been consolidated for the purpose of trial moved for a dismissal in both cases, urging that at the time alleged in the complaints Nealey was not the licensee on the alcoholic beverage control license, that he had only acted as the manager for both places, therefore, Section 6071 of the Revenue and Taxation Code was not applicable as to him [EGA p. 1]. It was contended that Nealey was in fact one of the owners, that he appeared frequently and regularly at the places that he handled buying and handling of transactions concerning the businesses. The court denied the defendant's motion to dismiss [EGA p. 2]. Nealey contended he was only the manager and that therefore Section 6071 of the Revenue and Taxation Code was not applicable. The defendants were by the court

found guilty and sentenced to the maximum sentence, to wit, six months in jail and a $500 fine as to each. One day was suspended.

Statutes Involved.

Section 6071, Revenue and Taxation Code, State of California. See Exhibit "B".

Section 6070, Revenue and Taxation Code, State of California. See Exhibit "B".

The Fourteenth Amendment to the Constitution of the United States.

Article I, Section 13, California State Constitution.

Rules on Transfer of Municipal and Justice Court Appeals adopted by the Judicial Council of the State of California, effective January 2, 1962.

Rule 62, Transfer (Cases Transferable):

> "A District Court of Appeal may order a case transferred to it hearing and decision when the Superior Court certifies or the District Court of Appeal on its own motion determines from an opinion of the Appellate Department published or to be published in Advance California Appellate Reports that such transfer appears necessary to secure uniformity of decision or to settle important questions of law."

Rule 63, Certification:

> "(a) (Authority to make) The superior court on application of a party or on its own motion may certify that the transfer of a case to the District Court of Appeal appears necessary to secure

uniformity of decision or to settle important questions of law. Such certification may be made by a majority of the judges of the appellate department or, in a county having no appellate department, by the judge hearing the appeal. When there was a trial in the superior court, the judge who tried the case may make such certification. If any judge of the appellate department who participated in the decision is unable to act on the certification, then a judge designated or assigned to the appellate department by the chairman of the Judicial Council may act in his place. If the judge who heard the appeal or tried the case is unable to act, then the certification may be made by a judge designated by the presiding judge or, if there be no presiding judge, by any judge of the court.

"(b) (Application for certification) Any party may apply to the superior court for the certification of a case after judgment in that court. If there was no trial in the superior court such application shall be served and filed before the judgment on appeal becomes final as to that court and may be included in any petition for rehearing. If there was a trial in the superior court, the application shall be served and filed at least 10 days before expiration of the time for certification. Any other party may serve and file an opposition within five days after the filing of the application. No hearing shall be held on the application and the failure of the court to certify the case shall be deemed a denial of the application."

Statement of the Evidence Pertinent to This Petition.

The evidence was to the effect that at two places in Pasadena, California, alcoholic beverages and other merchandise were sold to retail customers during the time alleged in the complaint; that your petitioner Theodore Roosevelt Nealey acted as manager at both places, stating that the owner and the licensee of both places was Inez Dankins, his mother. Nealey had been the previous owner of these places and there had been numerous transfers of operation. Exhibit C, a seller's permit issued January, 1961, to Inez Dankins at one of the locations was introduced in evidence [EGA p. 2]. Nealey, during nine months of 1961, signed sales tax returns, sometimes signing as taxpayer and sometimes indicating he was signing as manager, and sometimes just signing his mother's name to the return. He had a general power of attorney executed by his mother. This was received in evidence [EGA p. 2]. The evidence indicated that because of the failure to file three monthly returns, January, October and November, 1961, for one of the premises, the Board of Equalization of California deposited in the mail addressed to Inez Dankins, postpage prepaid, a notice of revocation of the sales tax permit, February 28, 1962. A photostatic copy of the revocation, together with an affidavit of mailing, was received in evidence, showing that seller's permit at one of the places was revoked. The evidence was also to the effect that an agent of the Board of Equalization of California called on one of the bartenders at one of the locations and left with him a copy of the notice of revocation of the seller's permit.

The bartender testified he did not recall receiving the notice or talking to the representative from the State Board of Equalization. There was evidence that Nealey had had several conversations prior to the issuance of the complaint with the representative of the State Board of Equalization relating to delinquencies and failure to file the returns. The representative of the Board testified he told Nealey that the permit at one location had been revoked and that each day he remained open was a separate violation of law [EGA p. 3]. There was evidence that the defendants had sent to the State Board daily payments subsequent to the alleged above conversation and subsequent to the issuance of the complaint. The representative of the State Board of Equalization testified he had told Nealey that they could not operate, that the moneys received in payment of the taxes were deposited and credited to the account of the taxpayer. As to one of the locations, the officer testified there were no records with the Board of Equalization of any seller's permit for those premises under any name [EGA p. 4]. The defendants made an offer to introduce in evidence a purported handwritten inter-office communication, dated August, 1960, by an employee of the State Board of Equalization, which contained matters which would tend to prove the bias and prejudice of the State Board's witness, Hunt, who testified against these defendants at the time of the trial. Objection to this by The People was sustained. Testimony was offered that Nealey, during the course of the trial, contacted the State Board of Equalization, they arrived at a determination of amount of delinquencies in sales tax and the defendants filed the re-

quired returns for both locations and offered the money, which the State refused [EGA p. 5]. The statement of the proceedings at which and the manner in which the Federal question sought to be reviewed was raised.

There is no official stenographer's report of the proceedings at the trial, but the engrossed statement on appeal reflects what occurred and the various objections. At the outset, a motion to dismiss was made as to petitioner Nealey on the ground he was not the licensee, and that he only acted as manager for both places [EGA p. 1]. The evidence showed that petitioner Dankins had been the licensee and not Nealey at the times involved [EGA p. 2]. The motion for new trial was made and by the court denied [EGA p. 6]. At the time of the trial, the petitioners raised the questions herein brought to the attention of this court [EGA 7, 8]. This was certified to in the engrossed statement on appeal. Each of the questions herein called to the attention of this court were brought to the attention of the trial court in the engrossed statement on appeal filed by counsel for the defendants, your petitioners, as follows [EGA 7, 8]:

1. The appellants are interested in raising, first the matter of, not being allowed to enter into evidence the inter-office communication upon which an offer of proof was made by defense counsel to show the prejudice and bias of Mr. Hunt of the Board of Equalization, and therefore that his testimony should be distrusted with reference to his denial that an agreement had been made to allow Nealey to pay the tax arrearage from the daily receipts, and to operate the business in the interim.

2. No evidence was introduced as to the revocation of the permit at 754 North Fair Oaks charged in Count One.

3. The matter of the Court stating that at the time of passing sentence that he reluctantly took into consideration certain things which had not come to his notice during the trial, for he said "I am cognizant of other transgressions at the Dew Drop Inn, and the problems to the police department."

4. The appellant also raised the point of insufficiency of the evidence to facilitate a revocation of the license at 759 South Fair Oaks, Pasadena, California, as the evidence was silent with reference to any notice of revocation being served as to the said address or as to a tax delinquency.

5. The appellant also wishes to seriously raise the point of the bias and prejudice of the Jurist trying the case, to wit, the Honorable John F. Hassler, which displayed itself at the time of sentence. That the issue was foreclosed at Court by the Honorable Judge denying summarily the motion for new trial. That the argument of appellant in this regard is corroborated by the appellants (one of which is a woman of more than 65 years of age) being given the maximum penalty provided by law, to wit, six (6) months in jail and a $500.00 fine, or in the alternative 50 days in event the fine was not paid in addition to the six months sentence.

6. That Section 6071 of the Revenue and Taxation Code only applies to a person licensed as a seller, and hence is not applicable to the defendant Nealey as controlled by Sections 23300 and 23301 of the Business and Professions Code.

7. That at no time were the appellants accorded a hearing under Section 6070 of the Revenue and Taxation Code prior to the revocation of their Retail Sales Permit, and no evidence was introduced at the time of trial to indicate that such a hearing had been accorded the appellants prior to the initiation of criminal charges thus denying the defendants their rights under the Fourteenth Amendment to the Constitution of the United States and Article 1, Section 13 of the Constitution of the State of California.

Summary of Argument Relied Upon for Allowance of the Writ.

1. The appellants were denied due process of law in that the section of the code providing of the giving of notice prior to the revocation of a license was not complied with.

2. Nealey was not the licensee and therefore was not subject to prosecution. The prosecution can only be had as against the person who was the licensee.

3. There was a denial of due process of law by reason of the failure to give the notice and grant a hearing as required by the code sections hereinbefore referred to and set forth in the provisions relating to statutes involved. This was in violation of the rules laid down in *Cole v. Arkansas*, 333 U. S. 196, 201, and *In re Oliver*, 333 U. S. 257, 273. Also *DeJonge v. Oregon*, 299 U. S. 353, 362. No charge was made at the time of the administrative hearing, in fact, there was none, and no notice of revocation of license or hearing thereon, no opportunity to meet the same.

4. It is our contention that the laws of the State of California are unconstitutional in that they deprive these petitioners from proceeding to the Supreme Court

of the State of California, which is the highest court of the state, and their appellate rights are limited to an appeal to the appellate division of the Superior Court with the exception of the new amendment which provides that the District Court of Appeal, if it determines that the decision is in conflict with others or reviewed, may transfer the case to it for hearing, or the court itself which had rendered the opinion, namely, the Appellate Division of the Superior Court, may certify the case. However, this is dependent upon the Superior Court itself desiring to give a hearing in the Appellate Court, and thus to bring this about by certifying the case. There is no provision in the law by which the appellant, your petitioners, may petition the District Court of Appeal or the Supreme Court of California for a hearing. Article VI, Section 1, of the Constitution of the State of California provides:

> "Judicial Power. Courts. Section 1.
>
> "The judicial power of the state shall be vested in the Senate sitting as a court of impeachment in a Supreme Court, District Courts of Appeal, Superior Courts, Municipal Courts, and Justice Courts."

The power of the Supreme Court has by these judicial enactments or rules been restricted and we contend this is unconstitutional. A defendant, whether it be in a Municipal Court or otherwise, should have the right by petition to appeal both to the District Court of Appeal and to the Supreme Court of the State of California on his own motion regardless of whether the lower court felt that he should have the right to so proceed or not. This is a denial of due process of law and a constitutional right.

ARGUMENT.

I.

It Was a Violation of the Due Process Clauses of the Fourteenth Amendment to the United States Constitution and Article I, Section 13, of the California Constitution It Was Reversible Error for a Criminal Trial to Be Heard in This Matter Before the Administrative Remedies Were Exhausted.

Petitioners assert that it was reversible error on the part of the trial court to proceed on the complaint for the reason that no allegation was made or proof offered that the administrative remedy required by the statute had been met.

Section 6071 of the Revenue and Taxation Code of California reads as follows:

> "Whenever any person fails to comply with any provision of this part relating to the sales tax or any rule or regulation of the board relating to the sales tax prescribed and adopted under this part, the board upon hearing, after giving the person 10 days' notice in writing specifying the time and place of hearing and requiring him to show cause why his permit or permits should not be revoked, may revoke or suspend any one or more of the permits held by the person."

Such a hearing is mandatory, we contend, and provisions for such hearings are contained in the Govern-

ment Code of California, Section 11180, *et seq.*[2] The failure of the Board to hold such a hearing pursuant to the code denies the appellants due process of law as guaranteed by the Fourteenth Amendment to the United States Constitution. It is further in violation of Article I, Section 13, of the California State Constitution, which provides for due process.

Appellant Nealey was not one of the persons liable under the wording of the statute itself.

The code holds liable persons or officers of the corporation and as set forth in Sections 23300 (Appendix "B") and 23355 of the Government Code. This is held to mean the person to whom the license is issued, the licensee. Nealey was not the licensee, but regardless of that no hearing was held as to either of the defendants, your petitioners. There was no evidence in this trial that any violations as alleged at the places as a basis for a revocation of the licenses had taken place.

The learned Appellate Division of the Superior Court, in its memorandum opinion, asserts in effect that the mere sending of notice to the defendant Dankins, even though it was not received by her, was sufficient to notify her of the steps being taken against her by the State Board of Equalization. This, we contend, does

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[2]11180 Government Code:

"The head of each department may make investigations and prosecute actions concerning:

(a) All matters relating to the business activities under the jurisdiction of the department.

(b) Violations of any law or rule or order of the department.

(c) Such other matters as may be provided by law."

not answer due process. One is entitled to notice of the charge and a time and place to meet it.

As was said in *Cole v. Arkansas,* 333 U. S. 196, 201:

> "It is as much a violation of due process to send an accused to prison following conviction of a charge on which he was never tried as it would be to convict him upon a charge that was never made. DeJonge v. Oregon, 299 U. S. 353, 362, 81 L. Ed. 278, 282, 57 S. Ct. 255."

Appellants assert that in effect the Court convicted them without allowing an opportunity to exhaust administrative remedies that were provided and that they were therefore denied effective due process.

The effect of the proceedings of the State Board of Equalization constituted a secret trial wherein the defendants were not given an opportunity to defend themselves. This type of procedure is not considered constitutional, as shown by the following excerpt from *In re Oliver,* 333 U. S. 257, 273, 92 L. Ed. 682, 694 (1947):

> "In view of this nation's historic distrust secret proceedings, their inherent dangers to freedom, and the universal requirement of our federal and state governments that criminal trials in public, the Fourteenth Amendment's guarantee that no one shall be deprived of his liberty without due process of law. . . ."
>
> "Convictions upon a charge not made would be sheer denial of due process."
>
> *DeJonge v. Oregon,* 299 U. S. 353, 362, 81 L. Ed. 278, 282 (1936).

II.

The Provisions of the Rules as Laid Down in the Rules Relating to Appeals From Municipal Courts to the Superior Courts, as Hereinbefore Set Forth, Are Unconstitutional.

In the interest of brevity; we respectfully direct the court's attention to the statutes hereinbefore set forth, namely, the Constitution of the State of California, wherein it relates to the creation of our courts, as set forth in Articles VI, Section 1, of the Constitution of the State of California, plainly provides that the Supreme Court is the final and supervising court of the State for final power is vested in it. To deny to a defendant in a criminal proceeding the right to go to that court freely and without the consent of a lower court is to deny to him the right of due process of law.

As was said in *Lisenba v. California*, 314 U. S. 219, 62 S. Ct. 280:

> "As applied to a criminal trial denial of due process is the failure to observe that fundamental fairness essential to the very concept of justice. In order to declare a denial of it, we must find that the absence of that fairness fatally infected the trial. The acts complained of must be of such quality as necessarily prevent a fair trial."

This, of course, is a question of procedure, and as we have outlined hereinbefore, this defendant was not given the hearing before the administrative body. He then is required to proceed to trial in the Municipal Court on the charge which would not lie because he was not the subject of the denouncing statute. He was not the licensee. Then, before the Appellate Division

of the Superior Court, he is denied the right to proceed further unless it be with the consent of said court, which is required under the amendment to the rule hereinbefore set forth to have the opinion published. It then goes to the District Court of Appeal and that court may on its motion, or, if the Superior Court has suggested that the matter be certified to the District Court, grant a hearing. Otherwise, when he reaches the Superior Court, the Appellate Division thereof, he is done so far as the State of California is concerned.

We believe that this is an unconstitutional provision. The constitution of this state has been in effect for more than a hundred years and the powers of judicial proceedings were vested in the Supreme Court.

This leaves open only to the defendant the right to petition this court for a hearing. We do not mean in any respect to belittle this right, for it is a tremendous opportunity to have this court review as it should the proceedings below. See *Rochin v. California*, 342 U. S. 165 to the end that a fair trial is accorded every defendant in a criminal proceeding.

Conclusion.

We respectfully urge that by reason of the foregoing these petitioners were denied that fair trial guaranteed by the constitution. It is appropriate here, we believe, to call the court's attention to this which occurred at the time of the sentencing of these defendants, your petitioners. The court at the time said this:

> "I am cognizant of the other transgressions at the Dew Drop Inn (759 North Fair Oaks Avenue) and the problems to the police department, the courts

and to the prosecutors and the financial burdens to the taxpayers. Reluctantly, I take these things into consideration in passing sentence. Accordingly, I sentence each of you to the maximum term prescribed by law."

Such advocacy by the court is not part of our system of jurisprudence and is inconsistent with the precepts of a fair and impartial trial, and raises a grave doubt as to whether this particular judge should have heard this case at all, if he had these things in his mind at the time. As has been said:

> "What is a fair trial? The bars which guard the right to a fair trial such as is guaranteed by our constitution include court procedure, rules of evidence, and proper instructions to the jury. These bars must not be lower. To do so is to strike at the very foundation of our system of jurisprudence, which has for its ultimate goal the preservation and protection of the representation and freedom of the individual citizen."

Miller v. United States, 120 F. 2d 968, 973.

And as was said:

> "It is axiomatic that when an accused is denied that fair and impartial trial guaranteed by the law such procedure amounts to a denial of due process of law."

Powell v. Alabama, 287 U. S. 45, 55 S. Ct. 55.

Wherefore, your petitioner respectfully prays that a Writ of Certiorari may be issued out of and under the deal of this court directed to the State of California to

the end that the judgment of the Appellate Division of the Superior Court of the State of California, in and for the County of Los Angeles, affirming the judgment of the lower court, be reviewed, and thereafter reversed.

Respectfully submitted,

RUSSELL E. PARSONS,
Attorney for Petitioners Inez Dankits and Theodore Roosevelt Nealey.

EDWARD I. GRITZ,
WALTER L. GORDON, JR.,
Of Counsel.

EXHIBIT "A".

Opinion of the Appellate Division of the Superior Court of the State of California.

Superior Court of the State of California, for the County of Los Angeles.

The People of the State of California, Plaintiff and Respondent, vs. Inez Dankins and Theodore Roosevelt Nealey, Defendants and Appellants. Trial Court No. M 57497 and M 57498. No. CR A 5215 No. CR A 5216.

This cause having been argued and fully considered, judgment is ordered as follows:

It Is Ordered and Adjudged that the judgments made and entered in the Municipal Court of the Pasadena Judicial District, County of Los Angeles, State of California, in the above entitled cause be and the same are hereby affirmed.

MEMO

The defendants were convicted of violating Revenue and Taxation Code 6071, engaging in business as sellers without a seller's permit. For one of them she had no sales tax permit; for the other a permit was issued to her in January, 1961, but was thereafter revoked. Notice of such revocation was mailed to her as authorized by R & T Code 6070. This was sufficient notice whether she received it or not. The alleged violations occurred after that. Nealey was the manager of both businesses and was in complete charge of them. He, too, is guilty

as charged because as manager with such full powers he aided and abetted Dankins in violating the section. There is no merit to defendants' complaint that the judge, when he pronounced sentence, took into consideration other transgressions at one of these cocktail lounges which had caused problems to the police department, the courts and the prosecutors. He was obviously referring to other cases in court which had caused trouble to the police and prosecutors. Of these he took judicial notice.

January 18, 1963.

SWAIN,
Presiding Judge,

We concur:

HULS,
Judge,

SMITH,
Judge,

EXHIBIT "B".

Section 23300, Business and Professions Code, provides:

"Necessity of license. No person shall exercise the privilege of performing any act which a licensee may exercise or perform under the authority of a license unless the person is authorized to do so by a license issued pursuant to this division (relating to alcoholic beverages)."

Sections 6070, Revenue and Taxation Code:

"Revocation or suspension. Grounds. Notices. Hearing. New Permits. Whenever any person fails to comply with any provision of this part relating to the sales tax or any rule or regulation of the Board relating to the sales tax prescribed and adopted under this part, the Board upon hearing after giving the person ten days notice in writing specifying the time and place of hearing and requiring him to show cause why his permit or permits should not be revoked, may revoke or suspend any one or more of the permits held by the person. The Board shall give to the person written notice of the suspension or revocation of any of his permits. The notices herein required may be served personally or by mail in the manner prescribed for service of notice of a deficiency determination. The Board shall not issue a new permit after the revocation of a permit unless it is satisfied that the former holder of the permit will comply with the provisions of this part

relating to the sales tax and the regulations of the Board."

Section 6071, Revenue and Taxation Code provides:

"Selling without permit. Offense. A person who engages in business as a seller in this state without a permit or permits or after a permit has been suspended and each officer of any corporation who so engages in business is guilty of a misdemeanor.

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IN THE

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October Term, 1962

No. 1036

[redacted] and Inez Dawkins,
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v.

[redacted] of California,
Respondent.

PETITION FOR WRIT OF CERTIORARI

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[redacted]
Attorneys for the Respondent.

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IN THE

Supreme Court of the United States

October Term, 1962

No. .....

THEODORE ROOSEVELT NEALEY and INEZ DANKINS,

Petitioners,

vs.

THE PEOPLE OF THE STATE OF CALIFORNIA,

Respondents.

OPPOSITION TO PETITION FOR WRIT OF CERTIORARI.

To the Honorable, the Chief Justice and the Associate Justices of the Supreme Court of the United States of America:

Respondent respectfully represents that the judgments and memorandum opinion of the Appellate Department of the Superior Court of the County of Los Angeles, State of California, entered by said Court on January 18, 1963, in the above cases, numbered CR. A 5215 and CR. A 5216, were duly and properly made, and that the Petition for the Writ of Certiorari should be denied.

Statement of the Case.

Two separate complaints were filed against both defendants, charging them each with violation of Section 6071 of the Revenue and Taxation Code of the State of California, at two separate locations in the City of Pasadena. It was stipulated that the sale of merchandise occurred during the period of time charged in the complaints and the cases were by stipulation of counsel consolidated for the purpose of trial.

The Engrossed Statement of Appeal is hereby referred to and made a part hereof.

The evidence established that Theodore Roosevelt Nealey was the son and Inez Dankins was the mother of Nealey and he had a general power of attorney from his mother.

The evidence established that Nealey had been the owner of the premises and there were several vague and indefinite transfers of title to the premises and that presently he was acting as manager only and his mother was the owner and licensee.

The evidence showed that Nealey was the person in charge of handling both places. That for the nine months in 1961 when Sales Tax Returns were filed, Nealey signed the returns, sometimes signing his name as tax payer, sometimes indicating he was signing as manager and sometimes just signing his mother's name to the return.

The evidence showed that because of the defendants' failure to file three monthly returns: January, October and November, 1961, for the premises at 759 North Fair Oaks Avenue, Pasadena, California, the Board of

Equalization deposited in the mail on February 28, 1962, addressed to Inez Dankins, dba Due Drop Inn, 759 North Fair Oaks Avenue, Pasadena, California, postage prepaid, a notice of Revocation of the Sales Tax Permit. A photostatic copy of the notice together with an affidavit of mailing was introduced into evidence.

The evidence also established that prior to the issuance of the complaints, two members of the State Board of Equalization personally served a copy of the same notice of Revocation of the Seller's Permit on one of the employees of defendants during the course of business at 759 North Fair Oaks Avenue, and told him to give the notice to Mr. Nealey and Mrs. Dankins.

It was further established that prior to the issuance of the complaints herein, defendant, Nealey had been havng conversations over an extended period of time with John Hunt, the Tax Compliance Supervisor of the State Board of Equalization, pertaining to delinquencies and failure to file the three monthly returns. That Mr. Hunt had personally advised Nealey that the Seller's Permit for 759 North Fair Oaks was revoked and that each day he remained open, was a separate violation of law.

The evidence in regard to the second place of business, located at 751 North Fair Oaks Avenue, Pasadena, California, established that as of the period of time covered in the complaints, there were no records with the Board of Equalization of any Seller's Permit for said premises under any name. That the previous Seller's Permit issued for said premises had been closed out at a prior transfer.

Inez Dankins although present in Court, did not take the stand to testify.

The trial court found both defendants guilty and sentenced them as provided by law.

Jurisdiction.

Although petitioners filed for a rehearing with the Appellate Department of the Superior Court which was denied on the 29th day of January, 1963, they did not seek or file for a certification to the District Court of Appeal.

Petitioners filed a Petition for a Writ of Habeas Corpus or in the alternative a Writ of Coram Nobis with the Supreme Court of the State of California, bearing number CR 7355, which was denied on April 3, 1963.

Petitioners seek jurisdiction to this Honorable Court under United States Code, Title 28, Section 1257(3).

Petitioners claim denial of due process in that they were not properly advised of the charges and that administrative procedures prior to filing the criminal complaints were not followed.

A further point involves the validity of the rules of the Judicial Council of the State of California.

In response to the Questions Presented for Review, the respondents allege as follows:

(1) The evidence and record of the trial will show that defendant Nealey was present at discussions with the supervisor of the Board of Equalization, pertaining to the matters involved in these cases and he was personally notified of the revocation.

That the Notice of Revocation was sent under authority of Section 6070 of the Revenue and Taxation Code of the State of California.

That further, the Notice of Revocation was personally served on an employee during the course of business and said employee was advised to give said notice to the owner and manager.

(2) Nealey admittedly was the manager and operator of the businesses, and at least on one month's return signed as the taxpayer. Even though not the licensee, he was the person who did engage in selling the merchandise without having a valid permit to sell as required by the Board of Equalization under Business and Professions Code Section 6071.

Petitioners were charged in the complaints in the language of the appropriate statute. They were given a fair and orderly trial.

Section 6071 of the Revenue and Taxation Code does not say a "licensee" who engages in business as a seller; it says a "person" who engages in business as a seller.

Inasmuch as the evidence shows Nealey personally operating and managing these premises and that he personally knew that the seller's permit was revoked, his selling was in violation of the law for himself and also for the alleged owner, his mother. The business was being conducted unlawfully after the revocation of the permit.

Where defendant aids and abets another in the commission of a crime, both are equally guilty.

California Penal Code 31;

People v. Keller, 165 Cal. App. 2d 419.

(3) The contention by petitioners that the laws of appeal of the State of California as applied to petitioners are unconstitutional, does not appear to be valid.

The remedy of appeal is of constitutional or statutory origin, it was not known at common law.

Legislatively and judicially it is recognized that finality of judgment must exist at certain points in all litigation.

Even before the 1961 Amendment to which petitioners refer, if there was a constitutional question involved, an appeal could be taken from the Appellate Department of the Superior Court of the State of California direct to the United States Supreme Court.

Petitioners in this case made no request for certification to the District Court of Appeal as provided in the Amendments to the Appellate Department Rules adopted by the Judicial Council of the State of California.

The appellate hierarchy has been set up by the state legislature and it is of course subject to the constitutional safeguards prescribed by the United States Constitution, which assures a fair and proper trial under our system of government.

Petitioners in addition to the three questions raised, set forth the following seven points:

1. Possible bias on behalf of one of the witnesses of the Board of Equalization. However, Nealey testified that he was always treated fairly and impartially by the members of the Board of Equalization. [Engrossed Statement p. 5, lines 15 and 16.]

2. That no evidence of revocation of the permit at the location of 745 North Fair Oaks was introduced.

The evidence clearly showed that there was no current permit issued for these premises. (751 North Fair Oaks.)

3. That the Court made certain comments at the time of sentencing. Comments at the time of sentence do not indicate bias and prejudice as to the decision, and the Court can take judicial knowledge of records of the court.

4. The question of insufficiency of evidence as to revocation of the license in regards to 759 North Fair Oaks Avenue, Pasadena, California. The evidence was possibly conflicting, but adequate to convince the trial judge.

5. The question of bias and prejudice by reason of denying summarily the motion for new trial and the type of sentence should be considered. The motion for new trial was not summarily denied; it was properly denied after argument by both sides. The sentence imposed was within the provisions of the law.

6. That Business and Professions Code Sections 23300 and 23301 control and therefore Section 6071 of the Revenue and Taxation Code is not applicable to Nealey. The Business and Professions Code sections pertain to licensing under the Alcoholic Beverage Control Act. Defendant Nealey is charged with selling without having a Seller's Permit under the Revenue and Taxation Code, or after a permit had been revoked.

7. That no hearing was accorded to petitioners prior to the filing of the criminal complaints. This is contrary to the evidence.

Conclusion.

Wherefore, your respondent respectfully prays that the Petition for a Writ of Certiorari be denied.

Respectfully submitted,

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City Prosecutor,
By DAVID PRESS,
Acting City Prosecutor
Attorneys for the Respondent.